Kansas City Terminal Elevator Company *and* American Federation of Grain Millers, AFL-CIO, Local Union No. 16. Case 17-CA-10693

March 3, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on November 2, 1981, by American Federation of Grain Millers, AFL-CIO, Local Union No. 16, herein called the Union, and duly served on Kansas City Terminal Elevator Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 17, issued a complaint on November 18, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 15, 1981, following a Board election in Case 17-RC-9283,[1] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about October 30, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On November 24, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On December 10, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on December 18, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On December 18, 1981, Respondent filed a motion to include an exhibit and a response in opposition to the General Counsel's Motion for Summary Judgment. On January 18, 1982, Respondent filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause Respondent admits the refusal to recognize and to bargain with the Union, but asserts that the Union's certification was improperly issued in Case 17-RC-9283 because the unit certified in that case is not appropriate.

Respondent reiterates this contention in its response in opposition to the General Counsel's Motion for Summary Judgment and further contends in its motion to include an exhibit that the Board should take administrative notice of the transcript of the underlying representation proceeding.[2] The General Counsel argues that, since Respondent admits the material allegations of the complaint, it is merely attempting to relitigate issues that were or could have been disposed of in the underlying representation case. We agree with the General Counsel.

Our review of the record, including the record of the underlying representation case (Case 17-RC-9283), reveals that the Regional Director for Region 17 issued a Decision and Direction of Election on August 7, 1981, in which he found appropriate a unit of all full-time and regular part-time production and maintenance employees and the leadman employed by Respondent at its Kansas City Terminal Elevator No. 1, located at 5801 Birmingham Road, Kansas City, Missouri, but excluding office clerical employees, temporary employees, professional employees, guards and supervisors as defined in the Act. In so doing, the Regional Director rejected Respondent's contention that the only appropriate unit should also include the full-time and regular part-time employees employed at its Elevator No. 2. Thereafter, Respondent filed a timely request for review of the Regional Director's decision contending that the unit should include certain employees at its Elevator Nos. 1 and 2 because, contrary to the Regional Director's findings, there is a high degree of interchange between the employees of the two facilities, the employees

[1] Official notice is taken of the record in the representation proceeding, Case 17-RC-9283, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] Respondent's motion is hereby denied inasmuch as the transcript of that proceeding has already been made a part of the record as defined in Secs. 102.68 and 102.69(g) of the Act as noted in fn. 1 of this Decision.

of both facilities have common supervision, and the two facilities, which are 1 mile apart, form a cohesive, functionally integrated and highly interdependent operation. On September 2, 1981, by telegram, the Board denied Respondent's request for review. Pursuant to the Regional Director's direction, an election was conducted on September 4, 1981, in the unit found appropriate. The tally of ballots indicated eight votes for, and six votes against, the Union and there were no challenged ballots. On September 15, 1981, the Regional Director for Region 17 issued a Certification of Representative.

On or about September 29, 1981, the Union, by letter, requested Respondent to recognize the Union and to bargain collectively with it as the exclusive representative of its employees in the appropriate unit. In its answer to the complaint and in its response to the Notice To Show Cause, Respondent admits that it refused and continues to refuse to recognize and to bargain with the Union. Further, Respondent concedes in its response to the Notice To Show Cause that it does not seek to submit further evidence in support of its position.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Missouri corporation engaged in the operation of grain elevators at two facilities located in Kansas City, Missouri, including a facility located at 5801 Birmingham Road, Kansas City, Missouri. Respondent in the course and conduct of its business operations within the State of Missouri annually purchases goods and services valued in excess of $50,000 directly from sources located outside the State of Missouri.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

American Federation of Grain Millers, AFL-CIO, Local Union No. 16, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees and leadmen employed by Respondent at its Kansas City Terminal Elevator No. 1, located at 5801 Birmingham Road, Kansas City, Missouri, excluding office clerical employees, temporary employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On September 4, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 17, designated the Union as their representative for the purposes of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on September 15, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 29, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 30, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive repre-

[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

sentative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since October 30, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Kansas City Terminal Elevator Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. American Federation of Grain Millers, AFL-CIO, Local Union No. 16, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees and leadmen employed by Respondent at its Kansas City Terminal Elevator No. 1, located at 5801 Birmingham Road, Kansas City, Missouri, excluding office clerical employees, temporary employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 15, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 30, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Kansas City Terminal Elevator Company, Kansas City, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with American Federation of Grain Millers, AFL-CIO, Local Union No. 16, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees and leadmen employed by Respondent at its Kansas City Terminal Elevator No. 1, located at 5801 Birmingham Road, Kansas City, Missouri, excluding office clerical employees, temporary employ-

ees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at Respondent's Elevator No. 1 facility located at 5801 Birmingham Road copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with American Federation of Grain Millers, AFL–CIO, Local Union No. 16, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time production and maintenance employees and leadmen employed by the Employer at its Kansas City Terminal Elevator No. 1, located at 5801 Birmingham Road, Kansas City, Missouri, excluding office clerical employees, temporary employees, professional employees, guards and supervisors as defined in the Act.

KANSAS CITY TERMINAL ELEVATOR COMPANY